United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1278

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To be argued by Warren S. Radler

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA

Appellant

vs

THE MERCHANT DIAMOND GROUP, INC.

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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QUESTIONS PRESENTED

1. Whether the district court correctly applied equitable principles in granting MDG's motion for the return of property after material inaccuracies were found in the Government's affi-

davit in support of the search and seizure warrants and in light of the nature and effect of the seizures?

2. Whether the proven material inaccuracies in the Government's affidavit were so reckless as to render the resulting seizures unreasonable and therefore unconstitutional in light of the nature and effect of the seizures?

STATEMENT OF FACTS

(a) BACKGROUND

This is an appeal by the United States from an Order of the United States District Court for the Western District of New York entered on June 23, 1977 and which returned MDG's property pursuant to its motion under Rule 41(e) of The Federal Rules of Criminal Procedure. (App. 4-5) The district court issued findings of fact and conclusions of law in support of its order on June 27, 1977. (App. 6-19)

MDG was incorporated in Florida on March 17, 1976, and became qualified to do business in New York State on September 16, 1976. MDG is engaged in the business of selling high quality dia-

monds and maintained an office at suite 1629 Statler Hilton Hotel in the City of Buffalo, New York. The parent corporation of MDG is the Merchant Diamond Group, Ltd., which was incorporated in the Province of Ontario, Canada, on April 17, 1974. MDG is a wholly owned subsidiary of the Merchant Diamond Group, Ltd. The principal officers of Merchant Diamond Group, Ltd. are Gerald Doren, President, and Anthony Lawrence, Vice President. (App. 71-72)

The facts and circumstances relating to the searches and seizures by the Government on April 14 and 15, 1977 of MDG's bank accounts, assets and records are essentially as set forth in the Government's brief and will not be here repeated.

As a result of the searches and seizures, the business of MDG was effectively terminated. Assets and bank accounts belonging to MDG in the amount of $429,993.08 were seized, along with over 129 diamonds of substantial value. (App. 12) The net effect of these illegal searches and seizures was to put MDG out of business. Neither the corporation, nor any of its officers, directors, employees, or agents were charged with the commission of any crime or indicted by the Government. (App. 13)

While these illegal searches and seizures were occurring

in the United States, MDG's parent corporation was also subjected to searches and seizures in Toronto, Ontario, Canada. (App. 12) Gerald Doren, Al Lindzon, Anthony Lawrence and Eric Marks were arrested by officers of the Royal Canadian Mounted Police. The searches, which were conducted at the home offices of the Merchant Diamond Group, Ltd., in Toronto, Ontario, resulted in the seizure of papers, books, documents and records of the business. As a consequence, Merchant Diamond Group, Ltd. was also abruptly put out of business.

(b) THE AFFIDAVIT OF POSTAL INSPECTOR SNYDER

The search warrants were based primarily on the affidavit subscribed to by Postal Inspector Ronald L. Snyder. (App. 20-30)

In his affidavit, Postal Inspector Snyder stated that on April 5 and 7, 1977, he met with officers of the Royal Canadian Mounted Police (RCMP) and received information from them concerning the activities of Merchand Diamond Group, Ltd. The RCMP had been conducting an investigation of Merchant Diamond Group, Ltd. for about two years and from February 1977 through March 31, 1977, the RCMP conducted court authorized electronics surveilances of various telephone facilities of Merchant Diamond Group, Ltd. in Toronto.

This resulted in the interception of in excess of one thousand telephone calls. From these telephone calls, a number of alleged misrepresentations made to potential customers in the United States and Canada were distilled.

The four alleged misrepresentations of MDG concerning which the RCMP allegedly advised Postal Inspector Snyder are as follows:

1. The diamonds being offered to the customer will, based on past performance, appreciate in value at the rate of 33% to 60% per year. (App. 22)

2. There is a ready market for the resale of diamonds so that the customer may liquidate his diamond holdings at will. (App. 23)

3. Merchant, Ltd. will buy back at prevailing retail prices any diamonds purchased from it. (App. 23)

4. The appraised value of the diamonds sold to the customer will be determined by an independent gemologist who is a member of the Gemological Institute of America. (App. 24)

The RCMP had allegedly been advised by Robert Arend, a gemologist, that the values of diamonds as a commodity have had a maximum rate of appreciation in recent years of between approxi-

mately 8% to 9% per year and that this rate of appreciation applies to raw, uncut diamonds, which appreciate in value at a faster rate than the cut and polished diamonds being offered for sale by MDG. (App. 22)

The RCMP allegedly advised Inspector Snyder that it had contacted numerous experts in gemology, and that no retail market existed for the resale of diamonds. It was alleged that the retail prices being charged by MDG varied from 200% to 300% of the wholesale price paid by MDG and accordingly, unless a customer was willing to sell his diamonds on the wholesale market and take a substantial loss, no ready market existed in which he could dispose of his diamonds.

The RCMP allegedly advised Inspector Snyder that, in the vast majority of instances where customers had sought a buy back of their diamonds, MDG had refused.

Finally, it was alleged that MDG's appraiser, Theodore J. Caldiera was not a member of the Gemological Institute of America (GIA) because a check of the records of GIA indicated that he is not listed as a member. It was also claimed that MDG misrepresented that Robert Arend was its appraiser when in fact Robert

Arend had refused to serve in that capacity.

In addition to these four alleged misrepresentations, it is noteworthy that the affidavit alleges that the diamonds sold by MDG were of "widely varying quality". (App. 22)

(c) PROCEDURAL HISTORY OF THE RULE 41(e) PROCEEDING

On April 20, 1977, an application was made by the Government for the sealing of these warrants and returns. (App. 121-122) Although MDG requested access to these documents (App. 157-159) the district court denied that application and directed the Clerk of the Court to seal the documents. (App. 132-133) Immediately thereafter, MDG brought a motion, returnable on April 25, 1977, for inspection, examination and copying of any and all documents, affidavits and other materials constituting the applications, the warrants and the returns of those warrants, which were issued by the district court and the Erie County Court. (App. 134-149) 1/

1/ The Government's brief (p.24, fn.19) in this regard is plainly in error. It was MDG and not the Government which requested the unsealing of the warrants in order to prepare its case for the return of property.

On May 13, 1977, the order freezing the bank accounts of MDG were extended by the Hon. John T. Elfvin for an additional thirty day period. (App. 66-67) This application was made by the Government ex parte despite the fact that the Government knew MDG was represented by counsel at that time as MDG's counsel had already appeared twice in these proceedings. (App. 180-181) Indeed, this ex parte order was never served upon MDG's counsel.

MDG brought its motion for the return of property by order to show cause on June 8, 1977, and made returnable by Judge Curtin for June 10, 1977. Contrary to the assertion in the Government's brief (p.23, fn.19), MDG moved with dispatch to file its proceeding under Rule 41(e). For proper preparation of its case, MDG required access to the books and records of Merchant Diamond Group, Ltd. in Canada where the RCMP had refused to permit inspection and copying. MDG was required to move in the Canadian Courts to inspect and copy these documents which eventually formed the basis for its affidavit in support of the Rule 41(e) proceedings. This is clear from the papers submitted by MDG in the proceedings. (App. 89-90) On June 1, 1977, MDG was granted access to these documents and it promptly made its application.

MDG's action should be contrasted with the activity of the Government during this time frame.

The Government did very little to press its case, if any, against MDG during this time, In fact, the Government's activity consisted of subpoening insurance company records, reviewing tapes and contacting diamond experts. (Application and Order of June 10, 1977) The Government never explained why this took two months, nor did it ever set forth any facts to show why the freeze of MDG's funds was important to its investigation. That the Government's actions were causing irreparable harm to MDG was recognized early on by Judge Curtin:

> The Court: ...Mr. O'Keefe, it has been some time here has gone by. As far as your position is concerned, this is the first, at least I have heard, and when we had the application here from Mr. Fitzgerald and initially there was an argument here that this freeze should not be in place. However, in order to give the Government time to make their investigation because I believe that the papers that were submitted warranted that kind of an opportunity; I denied application of Merchant Diamond for the return of their property and permitted, - gave you an opportunity to run your investigation but you have had some time now so I think we must certainly at the very least, have a hearing.
>
> Mr. O'Keefe: Yes, your Honor. (App. 194-195)

The district court voiced its concern relative to the

irreparable harm being sustained by MDG on many occasions throughout the proceedings (App. 169-170, 177, 194, 195, 382)

(d) THE RULE 41(e) HEARING AND THE DISTRICT COURT'S FINDINGS

The district court conducted an extensive hearing on MDG's application for return of property. 2/ In this regard, the Government has apparently lost sight of the sole purpose of MDG's Rule 41(e) application, namely, for the return of seized property. 3/ Although the application papers denominated the proceedings as one for "the return of property and suppression of evidence", it was made abundantly clear at the outset by counsel for MDG that this was not a suppression motion but "merely an application under Rule 41(e) for the return of . . . property".

> ...It is not, incidentally, as might be gathered by a failure on our part to correct the heading in the affidavit. This is not a motion for the suppression of evidence, incidentally. I am sorry that we had that. It was initially felt we would join it but I want the record to be very clear it is merely an application under Rule 41(e) for the return of our property which we claim is being held pursuant to a search and seizure warrant based upon incorrect information ...(emphasis added) (App. 192)

2/ The hearings took place over a period of time from June 15 through June 22, 1977.

3/ Indeed, the Government's entire brief is premised on a misreading of the nature and scope of MDG's application.

It is significant that not once during the entire proceeding in the court below, did the Government, as it does now, ever object to the scope of the inquiry being conducted by the court, although the district court was careful to inform the Government of the intended scope of the hearing at the outset. (App. 194-195)

The Government apparently expected that it would prevail because it would produce the tapes.

In this connection, the Government misrepresented the availability of the tapes repeatedly.

Thus, at the time application was made to Judge Curtin for a search warrant in April 1977, the Government represented that (a) the electronic surveillance was conducted in accordance with Canadian Law (App. 526) and (b) that the tapes would be available for proceedings in the district court. (App. 530) The court, in issuing the warrants, relied on the prosecutor's representation. (App. 530)

The misrepresentation of the Government was compounded in its ex parte application for an extension of the freeze order

when the Government further alleged to the court that it had "received thousands of hours of tape recordings and that these tape recordings were now in its possession". (Government's Application of June 10, 1977)

Similarly, in the Government's answer to MDG's show cause order, the Government unequivocally stated that it "is prepared to play these recordings for the court". (App. 114)

The Government failed abysmally to live up to its representations. Indeed, it was not until the last day of the hearing that the Government first indicated to the court that it might not be able to produce the tapes. (App. 532)

The Government's final response to the court's request for the tapes was that "the tapes would not be available..." (App. 539) Such a position is incredible in light of the Government's previously stated position. It is respectfully submitted that the ultimate failure of the Government to produce the tapes was because to do so would violate Canadian law. See Canadian Protection of Privacy Act, Snow's Criminal Code, §§178.1 - 178.23 (1974) The expert testimony elicited at the hearing confirms this proposition. (App. 56-78) Indeed, the Government itself now admits

in its brief (p.26, fn.20) that the tapes could not have been produced legally.

The unavailability of these tapes was an important factor in Judge Curtin's decision:

> You told me we would have the tapes available when you represented to me when I signed this for, you would have it available. You are absolutely asking me to make a decision in the dark and I will not do it...
>
> * * * *
>
> Here we have undisputed evidence that they [diamonds] were brought back. Here we have unrebutted the fact that over a period of time that these diamonds did, - a phenomenon, but did increase in value. Maybe a small number only, but it is unrebutted... (App. 530-531)

It is apparent that Judge Curtin considered the tapes essential in making his decision because after listening to the testimony of the witnesses, there were material inaccuracies in all material aspects of Postal Inspector Snyder's affidavit which inaccuracies were never refuted by the Government.

After hearing extensive testimony, the district court found that Postal Inspector Snyder's affidavit contained a number

of inaccuracies, as set forth in its findings.

The court found that MDG had submitted unrebutted proof through voluminous business records and testimony including expert witnesses that the diamonds purchased by it appreciated at the rate of 15% to 37% depending upon the size of the stone. This evidence was not refuted by the Government.

The court, in fact, found that MDG's position was supported by the Government's own witness, Robert Arend, who explained that there had, indeed, been a phenomenal increase in the value of diamonds in the last year and that the records of MDG purchases and sales were not out of line with the experience in the industry generally. Contrary to the Government's assertion in its brief (p.10, fn.8), that the court misquoted Mr. Arend the court correctly quoted that Government witness. (App. 443-444) Similarly, contrary to the Government's assertion, it was Mr. Arend who testified that there had been an increase in diamonds in the industry generally as set forth in MDG's exhibits. In addition, the court noted that Mr. Arend testified [illegible] the statement that rough diamonds increased in value at a r[illegible] 8% to 9% per year and that this was greater than the appreciation of cut and polished stones, was in fact misunderstood by the RCMP and that in reality his experience in the industry generally was that cut

and polished diamonds appreciated at a rate faster than raw diamonds. (App. 309) It was, therefore, clear from Judge Curtin's decision that as to the first misrepresentation alleged by the RCMP there was simply no substance to that claim.

Judge Curtin then considered the alleged misrepresentation relative to MDG's representation that there is a ready market for resale and its "buy back" policy. He found that, while Mr. Arend had testified that it would be difficult for a purchaser to immediately resell a diamond purchased from MDG without sustaining a substantial loss, the same witness also testified that the amount of the purchase price was about the same as if the purchaser bought the diamond at retail. (App. 477)

The court considered the "buy back" policy in conjunction with the above and found that the affidavit's allegation that only ten buy backs had occurred was unsupported by the records in the hands of the Government at the time it made its application for a search warrant, which records were produced at the hearing by MDG. The court found from MDG's evidence that there were at least forty-two occasions in which customers were able to resell diamonds to MDG at the price originally paid. Such proof was unrefuted by the Government.

Finally, as to the alleged misrepresentation that MDG

had improperly used the name of Robert Arend in its promotional literature, the court simply pointed out that Mr. Arend testified that it was not until April 7, 1977, that he notified MDG that he no longer wished to have his name utilized in its sales promotion literature. The application for search warrants was only made on April 13, 1977.

Interestingly, the Government seeks to minimize the significance in the affidavit of the allegations that MDG sold diamonds of "widely varying quality". The Government's position is understandable since its own witness, upon whose statements certain of the Snyder affidavit is based, testified that, in fact, MDG's diamonds were "of high quality". The use of the words "widely varying quality" by Postal Inspector Snyder were clearly intended to infer that the quality of the diamonds being sold by MDG was inferior. The contrary was true. (App. 467)

Under the proof, Judge Curtin found that he had no alternative but to grant MDG's motion for the return of its property. He found that MDG had succeeded in establishing material inaccuracies in the Government's affidavit and that this shifted the burden of proof to the Government to show that the alleged misrepresentations by MDG were valid.

In so ruling Judge Curtin basically concluded that,

given the facts at hand, he could find no evidence of fraud and that MDG's operation appeared, at this point, to be a legitimate one requiring him to return to it the seized assets.

ARGUMENT

POINT I

SINCE THERE WAS NO CRIMINAL PROSECUTION IN ESSE AND ONLY A MOTION FOR THE RETURN OF PROPERTY WAS MADE, EQUITABLE CONSIDERATIONS CONTROL AND THE DISTRICT COURT CORRECTLY APPLIED THEM

From the inception of the proceeding below, it was clear that MDG was suffering irreparable harm and needed immediate relief. The district court evidenced legitimate concern over the freeze of MDG's assets which freeze had already been in effect for two months at the time of the hearing. (App. 194-195) MDG's initial application which attacked the affidavit of Postal Inspector Snyder alleged that there were inaccurate, false and misleading statements which formed the substance of Snyder's affidavit. (App. 80) On the original return date of MDG's motion (June 10, 1977), the district court found that the facts as alleged by MDG raised sufficient questions as to the accuracy of the Government's information. (App. 176) The scope of the inquiry which was to follow was well defined by the district court at this time. (App. 194-195) The Government did not object to or offer a definition as to what the scope of the hearing should be. It was MDG's position that its property should be returned because the Govern-

ment did not have a sufficient basis in fact for the searches and seizures which had occurred and until such proof was forthcoming, the irreparable harm suffered by MDG and immediate need for relief mandated the return of the property. Moreover, MDG pointed out that, since the Government's action had effectively put it out of business, there was no longer any pressing need for the Government to proceed since it had accomplished its purpose without further prosecutorial effort or expense and such a situation might go on indefinitely.

This court has not specifically ruled upon the scope of a hearing such as was conducted in the court below. This court has not considered the scope of hearing on an application for return of property where the attack is made pre-indictment and pre-arrest. The cases cited by the Government are wholly inapposite.4/

4/ Thus, the ruling in Kahn v. Flood, 550 F.2d 784 (2d Cir. 1977) and similar cases cited at pages 17-20 of Government's brief, are not appropriate for consideration in the case at bar. These cases deal with post-indictment motions for the return of property and suppression of evidence. Moreover, the court in Kahn found that there was no question that the affiant had accurately represented what was told him. Such was not the case at the proceeding below. See discussion, infra.

The Government's reliance on Judge Haight's decision in London Merchants (Addendum, Government brief) is similarly misplaced. There, the court relied on the laches of petitioner and the pendency of the instant proceeding in denying petitioner's application.

It is respectfully submitted that the standards enunciated in Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975) are applicable here. In that case, the Fifth Circuit stated that suits for the return of property, initiated prior to any civil or criminal proceedings, are governed by equitable principles, whether based on Federal Rule of Criminal Procedure 41(e) or on the general jurisdiction of the federal courts. There, the court held that whether to exercise that jurisdiction in a given case is subject to the sound discretion of the district court. The court set forth a number of facts to be considered by the district court in exercising its direction,

> First, and perhaps foremost, is the question whether the motion for return of property accurately alleges that Government agents... in seizing the property displayed a "callous disregard for the constitutional rights of the taxpayer". (citation omitted) Other factors to be considered: whether the plaintiff has an individual interest in and need for the material whose return he seeks; whether the plaintiff would be irreparably injured by denial of the return of the property; and whether the plaintiff has an adequate remedy at law for the redress of his grievance... 515 F.2d at 1243

These factors were all present in the proceedings below. It was established during the hearing that gross material inaccuracies were contained in the affidavit of Postal Inspector Snyder.

Given these inaccuracies, the probable cause which Judge Curtin originally found to be existing, was lacking. Thus, the original legal basis for the issuance of the warrants was defective. Despite the fact that the inaccuracies were clearly established, the Government failed and refused to explain or supplement the record and establish the probable cause necessary to sustain the warrant.

In addition, and perhaps more important in the context of these proceedings, MDG was suffering irreparable harm and needed immediate relief. Without its assets and money, it had no business and the Government had no need to go further. Nor did MDG have an immediate, adequate remedy at law for the redress of its grievance. It was only through the equitable proceeding below that it could rectify this harm. 5/ As noted, supra, MDG's only request for relief was for the return of its property.

The Government argues that equitable considerations should not control because Rule 41(e), while allowing for the

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5/ The Government now suggests that it might have returned the seized property on the condition that it was available for future use, (Government's brief at page 24) but no such offer was made in the court below. This would have rendered the entire proceeding moot. Roberts v. United States, 363 F.Supp. 37 (C.D.Cal. 1973)

return of property, also requires that the district court order that property inadmissible in any subsequent civil or criminal proceeding. The Government therefore argues that Rule 41(e) is inherently a motion to suppress and it would be an undue extension of the exclusionary rule to permit the suppression of evidence after an attack upon a facially sufficient affidavit as in the case at bar.

The Government's analysis of Rule 41(e) is incorrect. In DiBella v. United States, 360 U.S. 121 (1962), the United States Supreme Court, in ruling upon the Appellate jurisdiction of courts to consider motions for the return of property, inherently ruled that a motion for the return of property under Rule 41(e) could be made without entailing the question of suppression of that property as evidence. Thus, where a motion is made under Rule 41(e) solely for the return of property, as here, the exclusionary rule and its intended considerations simply do not apply. All of the cases cited by the Government to the effect that perjury must be shown when an affidavit is attacked are inappropriate because that standard only governs when the exclusionary rule is sought to be applied. 6/

6/ Moreover, the Government's cases also deal with post-arrest or post-indictment attacks. In the instant case, there had been neither arrest nor indictment.

Put another way, the burden of proof under Rule 41(e) varies according to the nature of the relief being sought, and according to the time when the motion is made. The burden of proof in moving for the suppression of evidence is and should be more difficult than the burden of proof in moving simply for the return of property. One involves constitutional standards and the other equitable standards.

Similar reasoning was applied by the district court in Lord v. Kelly, 223 F.Supp. 684 (D.Mass. 1963), appeal dismissed, 334 F.2 742 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965). There, the district court held that a pre-indictment motion for the return of property is a civil matter and should be so docketed. After finding that the moving party's motion for the return of its property should be granted, the district court went on to say that it found no need to apply the exclusionary rule to this return of property. It viewed the entire proceeding as an equitable one and returned the property to the moving party putting it in the same position as it was prior to the Government's illegal seizure.

It was only this relief which MDG sought in the district court below. It did not claim that the exclusionary rule should be

invoked. MDG merely m le a motion for the return of property and presented strong equitable facts and considerations for this return. See also Donlon v. United States, 331 F.Supp. 979, (D. Del. 1971); Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971); In re Fried, 161 F.2d 453 (2d Cir. 1947); Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974); Shea v. Gabriel, 520 F.2d 554, (9th Cir. 1975).

If the district court had ruled against MDG, an absurd situation would have resulted. A heretofore legitimate business would have been shut down upon the affidavit of one Postal Inspector despite the fact that each of the material allegations of the affidavit had been proven false. Furthermore, MDG would have no opportunity to establish its legitimacy until indictments were returned and trial was reached. In the meantime, its business would be closed down with no remedy at hand and the Government would have achieved a guilty rdict without arrest or indictment. It was, therefore, within the jurisdiction and sound discretion of the district court to conduct the hearing below, and to order the property returned.

The return of the property to MDG in no way impedes the Government's ability to bring on its criminal case, if indeed, it has one.

POINT II

IF CONSTITUTIONAL STANDARDS ARE IN FACT TO BE APPLIED, THEN THE DISTRICT COURT DID NOT ERR BECAUSE THE GOVERNMENT'S AFFIDAVIT CONTAINED RECKLESS MISSTATEMENTS OF MATERIAL FACTS

If, as the Government contends, the exclusionary rule applies because of the language contained in Rule 41(e) relating to the inadmissibility of returned property, then it is respectfully submitted that the district court's decision was correct because Inspector Snyder's affidavit contained such material and far-reaching misstatements of fact as to render the affidavit reckless.

MDG agrees with the Government that impeachment of a facially valid affidavit can be established on two separate bases. The first is impeachment by a showing that the affiant purposely lied to the magistrate in applying for the warrant. The second basis is impeachment by a showing that the affiant negligently presented a falsehood of material importance to the finding of probable cause. It is respectfully submitted that under the second of these standards, the district court correctly decided that the property should be returned.

Postal Inspector Snyder's affidavit contained basically

six material facts - the four alleged misrepresentations by MDG previously discussed, facts concerning MDG's association with individuals who had previously been convicted of fraud and that the diamonds sold were of widely varying quality. Judge Curtin essentially found that all of these material facts were inaccurate and misleading. See discussion, supra. It is respectfully submitted that such a finding rendered the affidavit of Inspector Snyder reckless per se and the resulting search to be unreasonable. Moreover, the drastic effect of the searches and seizures, in light of these inaccuracies, renders those searches and seizures unreasonable.

The Government argues that the court did not find any "fault" with Inspector Snyder with respect to the misrepresentations because certain of the information given to him was based on information he received from the RCMP. However, it was clear during the hearing that Judge Curtin did, in fact, find that the misrepresentations of Inspector Snyder were due in part to his own conduct in drawing conclusions from the evidence and information given him by the RCMP. For example, the district court specifically questioned Inspector Snyder concerning the misrepresentation that MDG refused to buy back diamonds. (App. 262-273) In response, Inspector Snyder revealed that, in effect, the telephone calls did

not reveal that MDG refused to buy back diamonds but that MDG had simply told customers in a majority of instances that a particular salesman was not in. Judge Curtin later found that this was a fact which raised a serious question concerning the type of representation that Inspector Snyder made in the affidavit. (App 428-429) Moreover, the facts concerning the association of individuals previously convicted of mail fraud and stock fraud with MDG was seriously brought into question on cross-examination of Inspector Snyder. (App. 423-424) This cross-examination also revealed that Inspector Snyder was not even sure whether United States customers had been refused buy backs.

The Government's further disregard for appropriate safeguards is evidenced by the fact that the entire investigation which resulted in the seizure of all property of MDG and the freezing of all of its assets spanned a total of one week. Inspector Snyder himself stated in his affidavit that on April 5 and 7, 1977, he conducted his investigation with the RCMP. He did nothing else other than to confirm certain use of the mails and telephones in Buffalo and to contact the customs office. Most importantly, Inspector Snyder never attempted to contact any United States customers to determine whether they were displeased with the diamonds that had been sold or whether the particular facts of fraud existed under United States Law. Nor was any in-

dependent investigation conducted by the United States authorities of the MDG records in Canada. Such an investigation would have readily disclosed the inaccuracies and misrepresentations set forth in the affidavit.

These factors lead inevitably to the conclusion that the investigation into the activities of MDG was conducted in a reckless manner and the alleged misrepresentations were recklessly set forth in the Snyder affidavit.

The Government argues that MDG did not challenge the RCMP's description of MDG's representations to its customers and that its defense was that its practice essentially conformed to its representations, and consequently, the district court's decision that the tapes were necessary meant that the district court was interested in additional evidence to establish probable cause. (Government's brief at pages 25-26) The Government then states that the tapes were additional evidence outside the scope of proper inquiry and, therefore, the district court erred. MDG did, in fact, establish that its practice conformed to its representations, and consequently, established that Inspector Snyder's affidavit was not facially valid. The alleged misrepresentations were, in fact, valid representations by MDG. In light of this,

the district court obviously reviewed its own previous findings of probable cause and rejected the affidavit. The district court further decided that if probable cause was to be established it would have to come from the tapes themselves.

The district court's request for the tapes offered the Government opportunity to supplement the record and cure the misrepresentations in the Snyder affidavit. As previously stated, since the Government had represented to the district court that it had the tapes, had them legally, and was prepared to play then, the request by the district court for the tapes was not unreasonable. When the tapes were not produced, the district court was correct in drawing an inference contrary to the Government's case. Moreover, it would not have been proper for the court to permit hearsay testimony of Corporal Rowland as to the tapes because the requirements of Rule 1101(d)(1) of the Federal Rules of Evidence had not been complied with. 7/

The failure of the Government to present any evidence to rebut MDG's proof given the nature of the hearing, merely

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7/ As noted supra, the Government now claims that the tapes could not be produced because of the Canadian Protection of Privacy Act. No such position was taken in the court below so as to permit the introduction of secondary and hearsay testimony.

anointed the inaccuracies.

Impeachment of a facially valid affidavit is permitted by showing that the affiant negligently presented a falsehood of material importance to the finding of probable cause. United States v. Gonzalez, 488 F.2d 833 (2d Cir. 1973). In United States v. Gonzalez, this court noted that prior case law in this circuit did not specifically rule upon the question of whether a search warrant is valid when based upon a misstatement of material fact negligently or reckless made. In that case, since the misstatement involved was not material this court simply did not pass upon the issue.

The Seventh Circuit, however, has ruled on this question. In United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973), the court held that where there are reckless misrepresentations of material fact, the issuance of the warrant is improper. In so ruling the court held:

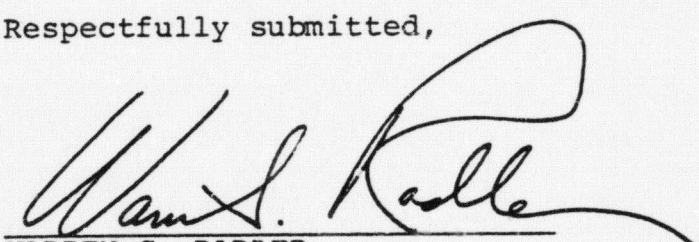
> We therefore conclude that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence.

Such a showing was clearly made in the court below.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this court affirm the decision of the court below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of October, 1977, a copy of the foregoing Brief was served by mail on the following:

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